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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

ROBERT L. BELL, d/b/a CRESCENDO PUBLISHING COMPANY,

Petitioner,

vs.

COMBINED REGISTRY COMPANY, AN ILLINOIS CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT OF FACTS

Defendant, Combined Registry Company, published a magazine known as SUCCESS UNLIMITED on a monthly basis. In its August, 1971 issue of the magazine, a prosaic work known as "Desiderata" was published. A complaint alleging copyright infringement by publication of this work was filed by Plaintiff Bell. (Pet. App. B, p. 16a)

In its defense of the action, Defendant acknowledged that it had printed the alleged copyrighted work but contended, among other things, that Plaintiff and his predecessors had abandoned and forfeited any right to protection under the copyright laws. (Pet. App. A, pp. 2a and 7a)

The cause was submitted to the district court by way of stipulation as to certain facts and exhibits and to the specific use of certain portions of depositions which were filed with the trial court to support the various contentions of the parties. (Pet. App. B, p. 19a)

The district court noted in its opinion that the copyright had been previously challenged in the district court of Ohio in *Bell* v. *Pro Arts, Inc.*, 366 F. Supp. 474 (N.D. Ohio 1973), aff'd 511 F. 2d 451 (6th Cir., 1975). In reaching its decision in this case, the district court agreed with the holding in Pro Arts (supra) stating that the copyright was indeed originally a valid one. This was the only issue which the two cases had in common. The Court went on to find, however, that the Defendant, Combined Registry Company, had sustained its burden of proof that the original author, Max Ehrmann, had both abandoned and forfeited the copyright in "Desiderata". (Pet App. A, p. 14a)

In reaching this decision, the district court referred to the series of correspondence between the original author and copyright holder, Max Ehrmann, and Merrill Moore. (Pet. App. A, pp. 9a, 13a) Moore wrote to Ehrmann for

the first time from Denver on July 20, 1942, explaining that he had given away a thousand copies of "Desiderata" in his psychiatry practice in Boston without knowing the author, and said that he was now continuing to use the work while on active duty as a psychiatrist with the United States Army. (Pet. App. A, p. 9a) Thereafter, in the correspondence between Ehrmann and Moore which followed this first letter, Moore requested and was granted permission to distribute the work and was sent additional copies of "Desiderata" which led the district court to conclude:

> "By letter Max Ehrmann expressly authorized the distribution, and copies of the work were distributed to many hundreds of men. What is critical is this factual issue: did the copies distributed by Merrill Moore include the required copyright notice. There is no direct evidence on this question. However, it is a fair inference that the distribution of the work through Merrill Moore was accomplished without the requisite copyright notice. All of the circumstances are consistent with such a conclusion, and inconsistent with a contrary one." (Pet. App. A, p. 12a)

In affirming the district court's decision, the court of appeals found:

> "The correspondence between Ehrmann and Moore does supply direct credible evidence of a general publication authorized by the copyright proprietor. In fact, the evidence reveals two authorized distributions of "Desiderata" by Moore: one in Denver in 1942, as revealed by Moore's November 3, 1942, letter to Ehrmann; the other in the South Pacific, as confirmed by Moore's letters of November, 1944" (Pet. App. B, p. 22a)

In the court of appeals, Plaintiff Bell raised two issues, pursued here, which had not been brought before the district court. He alleged that publication by Moore was a Government Publication, and, since whatever publication occurred took place overseas, there could be no forfeiture of the copyright. (Pet. App. B, pp. 23a, 25a)

After noting that the matter was raised "belatedly", the court of appeals found that Moore's distribution of "Desiderata" while on active duty as a psychiatrist was Moore's own idea and not directed or authorized by any governmental agency. (Pet. App. B, pp. 23a, 25a) It further found from the evidence that distribution and publication occurred while Moore was still in Denver, Colorado, and, therefore, conjecture regarding forfeiture by an "overseas publication" was unnecessary. (Pet. App. B, p. 26a)

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

A.

There Is No Conflict Among The Circuits Regarding Desiderata's Copyright.

Petitioner has requested that this Court grant his petition for writ of certiorari based upon what he alleges to be a "conflict among the Circuits", (Pet. Br., p. 5). Certainly this is one of the grounds for which writs have been granted. However, when such action is taken, it is not merely in an administrative or managerial capacity that this Court has acted, but in the exercise of its judicial function concerning questions of public importance regarding meaningful litigation, [C. F. *The Monrosa* v. *Carbon Black, Inc.*, 359 U.S. 180, 184, (1959); *Some Aspects Of The Judicial Process In The Supreme Court Of The United States* by Mr. Justice Harlan, 33 Australian L. F. 108 (1959)].

The decisions by the district court in the Seventh Circuit in the case before the bar, and its affirmance by the court of appeals do not contravene the decisions in the Sixth Circuit in *Bell* v. *Pro Arts, Inc.*, 366 F. Supp. 474 (N.D. Ohio, 1973), aff'd 511 F. 2d 451, (6th Cir., 1975) cert. den. 423 U.S. 829 (1975). In fact, the district court in the instant case cited with favor the decision of the court in the Sixth Circuit:

> "Pro Arts, of course, does have weight as precedent. In this connection it should be noted that the issues of prior publication without notice and of abandonment were never raised or passed on by the court in Pro Arts." (Pet. App. A, p. 3a)

and ruled accordingly:

> "Defendant raises two issues in an attempt to show that plaintiff is not the proprietor of the copyrights in issue. For the reasons stated below, the Court agrees with the holding in Pro Arts, supra, that plaintiff has sustained his burden of proof on this issue."
> (Pet. App. A, p. 4a)

Petitioner has subtly attempted to shield this fact from the court by indicating in a footnote that neither the district nor the court of appeals of the Sixth Circuit treated the abandonment or forfeiture issues, (Pet. Br., p. 6).

What the petitioner is really seeking is for this Court to restate its position in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313 (1970), so that the doctrine recited therein regarding the invalidity of patents will not be applied to copyrights. But there is no occasion for such activity on the part of this Court. Petitioner has failed to show that anyone but he has become confused or has misunderstood the impact of the decision in the instant case. No other court has failed to follow the decision rendered by the Seventh Circuit in the instant case regarding the forfeiture and abandonment of the copyright. Only if such an event occurs, which is most unlikely given the guidelines set forth in the *Blonder-Tongue* decision (supra), will there be such a conflict. If this Court were required to anticipate that some other court at some other time may rule contrary to or misinterpret its decisions, the burden would be insurmountable.

B.

The Decision In This Case Is In Conformity With Prior Opinions Of This Court.

Petitioner alleges that the district and appellate courts have misapplied the holdings of this Court which he

claims govern the facts and issues raised in the case below. In order to make such a determination, the petitioner brings to this Court's attention certain allegations which he claims show a violation of those holdings. (Pet. Br. p. 6)

This Court has stated time and again, "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnson,* 268 U.S. 220, 227 (1925). In *Southern Power Company* v. *Public Service Company,* 263 U.S. 508, 509 (1923), this Court stated in dismissing a writ of certiorari:

> "The petition therefore stated that the cause involved a grave question of vital importance to the public . . . The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use—primarily a question of fact. That is not the ground upon which we granted the petition and if sufficiently developed, would not have moved us thereto."

The petitioner seeks to have reversed the decisions of the district court and court of appeals without regard to what this Court has previously stated in *Graver Manufacturing Company* v. *Linde Company,* 336 U.S. 271, 275 (1949):

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. Goodyear Tire & Rubber Co. v. Ray-O-Vac Co., 321 U.S. 275; District of Columbia v. Pace, 320 U.S. 698; Williams Mfg. Co. v. United Shoe Machinery Corp., 316 U.S. 364; Baker v. Schofield, 243 U.S. 114, 118."

1. There Has Been No Contravention Of The Decisions Of This Court.

In the cases cited by petitioner to support his theory of limited publication (Pet. Br., p. 7) there was substantial evidence that the copyright proprietor was distributing the protected work for promotional purposes to enhance the possibilities of economic gain.

In each case there was evidence that the work was not to be sold, reproduced, distributed or diffused without first obtaining the permission of the copyright proprietor; there was no evidence of an intent or general permission to use the material except for the limited purpose; and, lastly, all infringers were either in violation of a specific agreement limiting the use of the work or had obtained the work from such a person. This is most especially true in *American Tobacco Company* v. *Werckmeister*, 207 U.S. 284 (1908).

Only in the case of *White* v. *Kimmel*, 193 F. 2d 744 (9th Cir., 1952), cited by petitioner, do we find a similarity. In determining that there had been an abandonment of the copyright by a general publication that court noted that there had been a distribution of "... at least as many as two hundred copies were put in unrestricted circulation over the long period between 1933 and 1946." (193 F. 2d 744, 747, 748)

The only evidence in the case before the bar regarding the distribution of the work by Moore were the letters between him and Ehrmann which covered a span of at most three years. The court below was aware that Moore claimed to have distributed "a thousand copies" prior to learning that Ehrmann was the author, and then was gratuitously granted permission to multigraph and distribute more copies. In fact Moore was furnished a package containing

copies of "Desiderata" by Ehrmann. In its findings the district court commented regarding those letters as follows:

> "Permission to use the work was given gratuitously. Nowhere was a copyright or copyright notice mentioned. The lone copy of the poem found in the Merrill Moore papers did not have such a notice. * * * The actions of Max Ehrman are not consonant with those of a copyright proprietor intent on protecting a commercial asset. Defendants have met the burden of showing that a forfeiture was more likely than not.
>
> In the face of defendant's showing on the forfeiture issue, plaintiff has offered no evidence in rebuttal." (Pet. App. A, p. 12a)

The court of appeals reached its conclusion, although totally disregarded by the petitioner, regarding the general publication issue using the following language:

> "The correspondence between Ehrmann and Moore does supply direct credible evidence of a general publication authorized by the copyright proprietor. In fact, the evidence reveals two authorized distributions of "Desiderata" by Moore: one in Denver in 1942, as revealed by Moore's November 3, 1942 letter to Ehrmann; the other in the South Pacific, as confirmed by Moore's letters of November, 1944." (Pet. App. B, p. 22a)

2. United Dictionary Company v. Merriam Company Is Not Controlling In The Instant Case.

In treating the issue of foreign publication raised in the court of appeals, that court stated:

> "Appellant has also argued that the finding of forfeiture should be set aside because in its view, Section 10 of the Copyright Act indicates that publication with-

in the United States is an element necessary to a finding of forfeiture. (Pet. App. B, p. 25a)

• • •

Appellant argues that since the improper publication, Moore's distribution of "Desiderata", occurred overseas, there can be no forfeiture.

We doubt that this section has any such effect, but do not find it necessary to interpret Section 10 on these facts. Clearly, there is ample room in the evidence to infer an authorized distribution of "Desiderata" by Moore while he was still in Denver, Colorado. On October 5, 1942, Moore wrote Ehrmann from Denver, '. . . I have distributed the beautiful copies which you sent me and want to thank you for them again. . . . '." (Pet. App. B, p. 26a)

The evidence to which the court had reference is, of course, the correspondence between Moore and Ehrmann which commences on July 20, 1942 from Denver, Colorado.

> "I think you should know that nearly every day of my life I use your very fine prose poem Desiderata in my work. . . . Here I have found your philosophy as useful and have used it considerably as part of the psychotherapy I am doing. . . . I must have given away a thousand copies in the last few years. A patient, a depressed woman, gave it to me once several years ago, with no name attached. . . ."
> (Pet. App. A, p. 9a)

This correspondence shows that not only did Moore use the work in his civilian practice in Boston prior to his learning the author's name, but that he was continuing his use of the work.

Immediately after the July 20, 1942 correspondence, Moore was furnished with a package of autographed copies of "Desiderata" by Ehrmann in response to his earlier request. Ehrmann furnished these copies knowing full well that Moore would distribute them upon

their receipt in Colorado. The fact of this distribution is confirmed by Moore's letter to Ehrmann of October 5, 1942 from Denver, Colorado. All of this correspondence could only be construed to indicate a continuous distribution by Moore of "Desiderata" without the required copyright notice in the United States with Ehrmann's knowledge and acquiescence. These conclusions are further reinforced by Moore's continuous distribution even overseas as stated in his correspondence dated November and Thanksgiving of 1944. (Pet. App. A, pp. 9a, 10a)

Petitioner now states that if the court below had ruled on foreign publication only, that finding would have violated the holding in *United Dictionary Company* v. *Merriam Company,* 208 U.S. 260 (1907). (Pet. Br., pp. 8 & 9) However, the court made no such finding, and further discussion regarding Section 10, Title 17 U.S.C., in this Court is as irrelevant as it was when it was raised for the first time on appeal.

C.

There Was No Publication By The United States Government.

The second paragraph of Section 8, Title 17, U.S.C. states:

> "The publication or republication by the Government, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgement or annulment of the copyright or to authorize any use or appropriation of such copyright material without the consent of the copyright proprietor."

Although petitioner belatedly raised this issue on appeal, the court of appeals reviewed and dismissed petitioner's contention that the publication by Moore was a publication by the Government. (Pet. App. B, pp. 23a–25a)

In relating the court of appeals' opinion, petitioner purposefully misconstrues the language used by that court in the hopes of creating an issue.

The question concerning that court was whether an item distributed and published by an individual on active duty as an army psychiatrist became a Government publication exempted by Section 8.

House Report No. 2222, 60th Congress, 2nd Session (1909), as adopted by the Senate, S. Rep. No. 1108, 60th Congress, 2d Session (1909) clarified the reasoning at the time of enactment of Section 8:

> "• • • is inserted for the reason that the Government often desires to make use *in its publications* of copyrighted material, with the consent of the owner of the copyright, and it has been regarded heretofore as necessary to pass a special act every time this was done, providing that such publication by the Government should not be taken to give to anyone the right to use the copyrighted material found *in the Government publication.*" (Emphasis added)

Petitioner faults the court of appeals for stating, "Desiderata was not nearly comparable in its significance to the governmental interest in the use of the Abraham Zapruder film. . . ." (Pet. Br., p. 11) When read in context, the court of appeals, rather than determining the worth or value of the prose, is in fact commenting on the absurdity of the plaintiff's contention. Its comparison of the issues and situations found in *Time, Incorporated* v. *Bernard Geis Associates,* 293 F. Supp. 130 (S.D.N.Y. 1968); *Marvin Worth Productions* v. *Superior Films Corp.,* 319 F. Supp. 1269 (S.D.N.Y. 1970); and *Sawyer* v. *Crowell Publishing Co.,* 46 F. Supp. 471 (S.D.N.Y. 1942) only strengthens that court's position.

Petitioner seeks to equate the position of Moore with the position of the employee discussed in *Sawyer* v. *Crowell Pub. Co.,* 46 F. Supp. 471 (S.D.N.Y. 1942). The court of appeals in *Public Affairs Associates, Inc.* v. *Rickover,* 284 F. 2d 262, 268 (D.C. Cir., 1960)[2] in reviewing that case stated:

> "• • • the court dealt with a map produced by government employees in the course of their duties, copyrighted by one employee and then published by the Government with notice of that copyright registration. The court held that as the map 'relates directly to the subject matter of the plaintiff's work' and was printed and engraved by the Government, the attempted copyright inured to the employer's benefit." (284 F. 2d 262, 269)

Regarding Moore's position, the court of appeals stated:

> "It is true that Major Moore was for some purposes an agent of the United States in his capacity as a psychiatrist in the United States Army. However, we think that Major Moore's distribution of *Desiderata* to soldiers lacks the requisite degree of governmental association or interest necessary to constitute a publication 'by the Government' within the meaning of 17 U.S.C., Section 8." (Pet. App. B, p. 24a)

Mr. Justice Harlan in his dissenting opinion in the *Rickover* case, 369 U.S. 111 (1962), agreed with the majority opinion that the record was insufficient to determine whether Admiral Rickover's speeches were copyrightable:

> "As I see it, decision of that issue turns not merely on whether such speeches were made by the Admiral in the 'line of duty,' but also, and in my view more

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2. Public Affairs Associates, Inc. v. Rickover, 284 F. 2d 262 (D.C. Cir., 1960), vacated on other grounds, 369 U.S. 111 (1962), on remand 268 F. Supp. 444 (D.D.C. 1967).

fundamentally, on whether such speeches were in any event 'publication[s] of the United States Government'." (369 U.S. 111, 118)

The language quoted by the court of appeals from *Rickover*, 284 F. 2d 262, 268, is most appropriate and decisive of this matter:

> "The copyright provision should read, we think, to refer to publications commissioned or printed at the cost and direction of the United States. These would be authorized expositions on matters of governmental interest by governmental authority." (Pet. App. B, p. 24a)

CONCLUSION

For all of the reasons cited herein this petition for a writ of certiorari should be denied.

Respectfully submitted,

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